UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
KANSAS CITY DIVISION

IAN POLLARD on behalf of himself and all others similarly situated	)	Case No. 4:13-cv-00086-ODS
	)	
Plaintiffs	)	
	)	**SUGGESTIONS IN REPLY TO PROPONENTS' OPPOSITION TO THE OBJECTIONS OF LEWIS FROST AND RICHARD L. DENNEY**
VERSUS	)	
	)	
REMINGTON ARMS COMPANY, LLC., SPORTING GOODS PROPERTIES, INC. and E.I. DU PONT NEMOURS AND COMPANY	)	
	)	
Defendants	)	

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MAY IT PLEASE THE COURT:

At the time that Objectors Frost and Denney filed their initial Objection, claim data for the "reminder" notice was not known. It is now clear that the second notice was an abject failure, as only 19,425 claim forms were submitted,[1] representing a claims rate of .259%. At least as significant is the revelation that 2,666 of the 19,425 claim forms submitted reported a no trigger pull discharge, a rate of almost 14%. Nothing can more acutely underscore the public safety issues involved in this case and the paucity of the notice efforts in view of the danger. Contrast this result with the $336 million *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009), *aff'd* 405 Fed.Appx. 532 (2d Cir. 2010) settlement, where an initial failed notice was re-noticed with better, more expansive mailings, media, and a revised claim form, driving claims from 90,000 claims to over 10 million claims. Of note, 27% of the 38 million mailings resulted in claims. Notwithstanding the assertions of the proponents of the settlement and their notice administrators, a proper, effective, Rule 23 compliant, and Due Process satisfying notice plan is available for this proposed settlement. See Francis McGovern, Ohio State Journal on Dispute Resolution, 2008, VOLUME 24 2008 NUMBER 1, p. 53

The notice was not designed to adequately inform the
class members or to encourage participation in the class.

The notice program used here was a failed experiment. Mail notice, the mainstay of effective notice, has been mentioned more frequently in terms of excuses, than in the context of how to accomplish mail notice as the backbone of the notice effort. *Mullane v.*

[1] Because the data was not provided either to Objectors or to the Court, it is not known how many of those claims were for a trigger retrofit and how many were for the coupon portion of the settlement.

Central Hanover Trust & Bank Co. 339 U.S. 306,314 (1950); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The proponents' submissions seem intent on downplaying the value of direct mail notice in contradiction of the well documented studies, experience and legal precedent. Conversely, proponents extoll the virtues of internet banner and email notice despite the lack of efficacy here and in other cases. See: *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840, 2013 WL 139732 (D. Kan. Jan. 10, 2013); *West v. Carfax, Inc.*, 2009 WL 5064143 (Ohio Ct. App. 11 Dist. Dec. 24, 2009); *Duran v. Obesity Research Inst., LLC*, 204 Cal.Rptr.3d 896 (Cal. Ct. App. 2016); *Schlesinger v. Ticketmaster*, No. BC304565 (Cal. Super. Ct. Los Angeles County Sep. 26, 2012).

As noted in the Affidavit of Todd Hilsee filed as Exhibit 2 *in globo* to Objectors' original suggestions in opposition to the settlement, and in Mr. Hilsee's supplemental affidavit, Exhibit A to this Reply (specifically made a part hereof), neither the original nor the "reminder" notice campaign was in fact designed to be successful in encouraging large numbers of class members to obtain retrofits of their rifles.[2] As Mr. Hilsee set out:

> 1. The alleged unavailability of targeted mailing addresses in Remington's files is not credible; e.g., warranty and repair records contain physical addresses and are model specific; the number of such mailing addresses has been withheld;
>
> 2. Mailed notice is most reliable and effective, as studies show and prior Remington class actions and recalls prove; hundreds of thousands if not millions of guns could be made safe if more mailings were done;
>
> 3. It was reasonable to seek and identify Class members' mailing addresses from third parties; available sources of addresses were not even asked to help;

[2] The coupon portion of the settlement, which is subject to even more scrutiny under the provisions of CAFA, will be discussed separately.

4. The Original Notice plan was not the best notice that was practicable and could not have reflected the "desire to actually inform" notice communications standard;
5. The "Re-Notification" plan was weak and its failure was foreseeable; the percentage increase in claims is meaningless because the starting point is so low;

6. The notices neither informed Class members how they, their families, their friends, and the public, they may be at risk of death and injury, nor directed them to company documents describing the defect; defect-denial language squelched response;

7. The notices were not designed to draw attention, in contrast with Federal Judicial Center model notices, Remington's sales ads, and its affiant's political ads;

8. The claims process was onerous and uninviting; it appears it did not intend to repair a meaningful number of guns; and

9. The settling parties and its affiants have withheld basic data that merit an adverse inference regarding the sufficiency of the effort.

Although the proponents of the settlement continue to contend that the take rate has nothing to do with the notice, other courts have flatly rejected this contention. In fact, an extremely low response rate in and of itself demonstrates that the notice process has not been effective. See, *Kaufman v. American Exp. Travel Related Services, Inc.*, 283 F.R.D. 404 (E.D.Ill. 2012). This Court on December 8, 2015, in cancelling the original hearing for final approval, stated that it could not "conceive that an owner of an allegedly defective firearm would not seek the remedy being provided pursuant to this settlement agreement. Thus, this low response rate demonstrates that the notice process has not been effective." After their much trumpeted "reminder" notice, the proponents of the settlement are forced to admit that the take rate in response is still about a quarter of a percent.[3] While the abysmal claims rate supports rejection of this settlement, what this court should reject is the deficient settlement, notice and claims process that is the genesis of the low claims rate. While the settlement itself has issues, the deficient notice and claims process result in a situation where class members are unaware of the settlement, misled by the notices, or deterred by the claims process, and therefore are deprived the due process required opportunity to opt out, make a claim, or object. The court should decline to sanction the use of an ineffective, experimental notice process which has yielded only a small percentage of claims despite the danger associated with not repairing the guns and releasing Remington from the future obligation to do so.

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[3] As reflected in the affidavit of Mr. Denney, he is very active in hunting-related organizations, a frequent reader of hunting-related materials, and the owner of several firearms covered by this settlement. Despite this, he was completely unaware of the proposed settlement until he was notified by a representative of Public Justice.

One of the fundamental problems here is that there is no incentive on the part of any of the proponents to maximize the take rate in this case. Remington incurs additional expense with each gun that is repaired. Plaintiffs' counsel get their fee regardless of whether one person takes or 7,000,000 people take. Plaintiffs' counsel have, by wholly endorsing the settlement, the notice, and claims process, rendered themselves impotent relative to negotiating needed changes for the benefit of the class.

The declarations of Weisbrot, Garretson, and Crouch are either not made on personal knowledge or fail to meet the required standards to be considered by this Court.

Proponents of the settlement have offered three affidavits in an effort to support their position and rebut the offerings of Todd Hilsee and Objectors. Yet, before one gets to content, affidavits must be made upon personal knowledge.

Amy Crouch is a lawyer, in fact, one of Remington's lawyers. A reading of her declaration clearly shows that it is not based on personal knowledge but rather puts forth hearsay information that she acquired through talking to unidentified Remington employees. Crouch's affidavit is a non-factual recitation of the materials that she heard Remington had available in order to formulate notice lists. "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FRE 602. There is no recitation of facts showing that the persons to whom she talked, and upon whose hearsay declarations she apparently relied, had any personal knowledge of anything within her affidavit. Her affidavit should be disregarded.

With regard to the declarations of Messrs. Weisbrot and Garretson, an additional issue arises. Neither of those declarations satisfies the criteria for expert testimony. As pointed out extensively in Mr. Hilsee's Affidavit on Outcome of Re-Notification and the affidavit of David Smith (Exhibit C), both the Weisbrot and Garretson declarations are rife with conclusions, sketchy on facts, and replete with statements that are simply not accurate, and are not supported by facts, data, and proper analysis/methodology. Mr. Weisbrot and Mr. Garretson are not media or notice experts; they are attorneys who do not meet the requirements of Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), or Kumho Tire Co. v. Carmichael 526 U.S. 137 (1999)*. Their opinions should be disregarded. Hon. Dickran M. Tevrizian & Jeanne C. Finegan, *Expert Opinion: It's More Than Just a Report . . . Why Qualified Legal Experts Are Needed to Navigate the Changing Media Landscape*, 26 TXLR 626 (May 26, 2011). The estimation of reach is based largely on experimental, untried methods of notice that the proponents of the settlement wish to pioneer in this case involving deadly products. As one commentator in the Westlaw Journal of Products Liability noted in discussing this case, the proponents' notice efforts have resulted in "a claims rate of less than one percent, in a case alleging a deadly product defect. This is not a shampoo falsely advertised as being sold only in salons. These are rifles with an alleged tendency to fire when no one has pulled the trigger." 27 No. 7 Westlaw Journal of Products Liability 12 (August 16, 2016). While the case comes before this Court in the posture of parties seeking final approval for a settlement with other parties objecting, the rules of evidence still apply.

The proponent of expert testimony must prove its admissibility by a preponderance of the evidence. *McDonough v. JP Morgan Bank, NA*, 2016 WL 4944099 (E.D.Mo. September 16, 2016). Federal Rule of Evidence 702 governs the admissibility of expert testimony. The Eighth Circuit has summarized Rule 702 as a three part test:

> First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact…This is the basic rule of relevancy. Second, the proposed witness must be qualified to assist the finder of fact...Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires.

Lauzon v. Senco Products, Inc., 270 F.3d 681, 686 (8th Cir 2001) (citations omitted). As set out fully in the attached affidavits of Mr. Hilsee and Mr. Smith, Exhibits A and C, there is no valid factual basis or support in the accepted analytical methodology for the conclusions drawn by Messrs. Weisbrot and Garretson. The case law is clear, and common sense dictates, that if the underlying facts that purportedly support an expert opinion are not valid, the opinion falls of its own weight.

The declarations of Messrs. Weisbrot and Garretson have another problem, as well. Both of those declarations, in particular Mr. Weisbrot, purport to tell the Court that due process has been satisfied without coupling that self-serving legal conclusion with appropriate facts and data or credentials. An expert should, as Mr. Hilsee does in his counter submissions, tell the court why or why not there has been Rule 23 compliance and whether due process is satisfied with reference to reliable data. A naked opinion that due process has been satisfied invades the province of this Court. It is for the court to satisfy itself whether an experimental, ineffective notice plan and an unfriendly claims process yielding a claims rate of approximately one-fourth of one percent, in a case involving extremely dangerous products, satisfies due process for the class and rises to the level of a fair and reasonable settlement.

The claims process, whether or not by design,
has clearly suppressed participation to an unacceptable level.

Documents obtained by Remington and published by Public Justice on its website (Exhibit D) demonstrate that Remington has been aware for many years that rifles equipped with the Walker Fire Trigger assembly have a significant likelihood of firing without the trigger being pulled. Derrick Lee Watkins, Remington's Director of Research and Development, testified in 2010 that between 100 and 200 Remington rifles had fired absent a trigger pull during Remington gallery testing. This information flatly contradicts the assertions that Remington has made in various media outlets, and at least inferentially in the notice, that Remington has never been able to duplicate the complaints of consumers that the rifles fired without a trigger pull. As of 1990, Remington's internal documents show that "the number of Model 700 rifles being returned to the factory because of alleged accidental firing malfunctions is consistently increasing." (Exhibit D) The mixed message communicated by (and/or simultaneously with) the notice indicates that the rifles are not or may not be defective.

The denial of liability by Remington may be, as the proponents of the settlement point out, standard in a products liability settlement. But, it does not need to be in the notice. Remington can preserve all deniability simply by inserting its denial in the settlement agreement, which it has done. As Mr. Hilsee pointed out in his original affidavit, the mixed message communicated by the alert to danger, followed by the denial of danger, acts to suppress participation in the settlement. Both the content and delivery of the notice are fatally flawed: the content, by diluting the warning regarding the extraordinarily dangerous product, and the method, by using experimental and untested notice in a case involving human life.

The settlement should also be rejected for the reasons set out in the brief of the Attorneys General of nine (9) states and the Attorney General of the District of Columbia. As the Attorneys General point out, their objection to the settlement is motivated by their "overarching responsibility to protect their states' citizens, including important matters of public safety and welfare." Their objection centers on the fact that potentially as many as 7.5 million defective rifles are at issue; if this Court approves the settlement, given the claims rate, there will still be more than 7,450,000 defective rifles available to cause bodily harm. Quoting *O'Neil v. Remington Arms Company, LLC*, 817 F.3d 1055, 1060 (8th Cir. 2015), the Attorneys General note that even Remington does not truly dispute the existence of the defect. The number of claims[4] is, as the Attorneys General note, shockingly low. Either the relief provided under the settlement is so poor that no one wants to claim, or no one knows about the settlement, or both. No other conclusion can be reached.

Moreover, the objection of the Attorneys General is also particularly pertinent to this case, because as to settlement classes A(3) and A(4), the envisioned settlement is a coupon settlement of the type that requires a significantly higher degree of scrutiny under the CAFA.[5] The Class Action Fairness Act of 2005 requires more "heightened judicial scrutiny of coupon-based settlements" than settlements resulting in cash payments. *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F3d 646, 654 (7th Cir 2006); *see also, Figueroa v. Sharper Image Corp.*, 517 F.Supp.2nd 1292, 1231 (S.D.Fla. 2017). Rule 23(E)(2) and 28 U.S.C. §1712(e) require the Court to determine whether the "value of the coupon settlement is reasonable in relation to the value of the claims surrendered." *Sobel v. Hertz Corporation*, 2011 WL 2559565, at *10 (D.Nev. June 27, 2011). As the Court stated in *True v. American Honda Motor Company*, 749 F.Supp.2nd 1052, 1069 (N.D.Ca. 2010), there is a quite "wide range of judicial and scholarly criticism of coupon settlements" and "such settlements are generally disfavored." This is because coupon settlements "often do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendants; and they often require class members to do future business with the defendant in order to receive compensation." It is apparent that all of these problems exist in this case. The plaintiffs in the A(3) and A(4) classes are the subject of a coupon settlement that requires them to do business with Remington in order to receive any compensation.

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[4] And no information was provided as to how many of these claims are for repaired triggers and how many are coupon claims.

[5] The proponents, in their opposition to the filing of the Attorneys' General *Amici* brief, state that this Court determined at the preliminary approval hearing on February 14, 2015 that the vouchers offered to these settlement classes were not coupons. The portions of the transcript cited by proponents is attached as Exhibit E. It is clear that this Court made no such determination, nor was it necessary for it to do so, given the minimal degree of scrutiny required for preliminary approval. If such a preliminary finding were made, it should be revisited as this is a coupon settlement under CAFA and the case law, such that heightened scrutiny is appropriate.

In this case, there is no justification for parties receiving coupons as a purported fix for a defective and dangerous firearm. These rifles have been previously repaired in connection with ongoing Remington recall programs and also can be repaired through insertion of aftermarket triggers, (see, Affidavit of Lewis M. Frost, Exhibit F) providing a safe product to the public and a release of future liability to Remington.[6] Moreover, certain members of the A(3) and A(4) classes are actually disadvantaged by the current proposed settlement, because their firearms have been the subject of ongoing recalls; however, this settlement would appear to terminate all benefits due to them under those recalls at the end of the *Pollard* claims period, whether or not A(3) or A(4) class members opt to receive the coupon that is offered as compensation. Such a settlement requires strict scrutiny indeed.

CONCLUSION

This settlement is not fair, adequate, or reasonable. The notice does not comport with due process, the one-quarter of one percent claim rate, combined with other

[6] As Mr. Frost points out, the assertions made by Remington in the present case that these rifles cannot be retrofitted is flatly contradicted by the representations on Remington's own website.

shortcomings, clearly shows that the settlement, notice, and claims process are deficient. If this Court approves the settlement, more than 7,450,000 defective rifles will continue to pose a deadly danger to their owners and to members of the public. This Court should reject the settlement.

Respectfully submitted,

MURPHY, ROGERS, SLOSS, GAMBEL & TOMPKINS, A.P.L.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 31st day of January, 2017, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of electronic filing to all counsel of record.

/s/ Gary J. Gambel